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SOME THOUGHTS ON THE MEANING AND SCOPE OF THE MONTANA CONSTITUTION'S "DIGNITY" CLAUSE WITH POSSIBLE APPLICATIONS*

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INTRODUCTION

In its landmark decision, *Gryczan v. State*,[1] the Montana Supreme Court found Montana's deviate sexual conduct statute unconstitutional because it intruded upon Montanans' right to privacy explicitly guaranteed by the Declaration of Rights, Article II, Section 10, of the Montana Constitution. As the court concluded:

> Montana's constitutional right of privacy—this right of personal autonomy and right to be let alone—includes the right of consenting adults, regardless of gender, to engage in non-commercial, private, sexual relations free of governmental interference, intrusion and condemnation.[2]

In addition to its Section 10 guarantee of privacy, Article II also includes a guarantee of individual dignity. This guarantee

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1. 283 Mont. 433, 942 P.2d 112 (1997).
2. *Gryczan*, 283 Mont. at 456, 942 P.2d at 126.

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avows: "The dignity of the human being is inviolable."[3] Interestingly, this dignity clause, which was discussed in some detail in the briefs of the parties and amici in *Gryczan*,[4] received no attention from the court in its opinion.[5] We believe this is unfortunate, but entirely understandable. The Montana Constitution's dignity clause is unusual,[6] and its meaning, scope, and legal significance are not, at first glance, obvious or clear.

There are, however, hints that some members of the current court, at least, might be inclined to find substantive meaning in the dignity clause. For example, in 1993, Justice Trieweiler in his dissent in *Stratemeyer v. MACO Workers' Comp. Trust*[7] spoke generally about the clause:

> The language in Article II, Section 4 of Montana's Constitution is simple plain, and clear. It provides that "[t]he dignity of the human being is inviolable. No person shall be denied equal protection of the laws." Yet, the purpose served by that language in any society based on equality is absolutely vital. It recognizes that majoritarian rule can at times be harsh, intolerant, and unfair. It recognizes that at times a basic framework of principle is necessary to prevent those with political influence from oppressing those without political influence.[8]

More recently in 1998, Justice Nelson, in a special concurrence in *Girard v. Williams*,[9] wrote more specifically:

> Under our Montana Constitution, Article II, Section 15, children enjoy the same fundamental rights as adults. At a bare minimum these include inalienable rights to a clean and healthful environment, to pursue life's basic necessities, to enjoy a safe, healthy, and happy life (Article II, Section 3) and to basic human dignity (Article II, Section 4).[10]

Neither of these references to the dignity clause, however, make

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3. MONT. CONST. art. II, § 4.

4. *See* Brief of the Respondent at 37-44, *Gryczan* (No. 96-202); Brief of the Women's Law Caucus at 2-5, 10-12, *Gryczan* (No. 96-202). *See also* Brief of the Appellant at 18-22, *Gryczan* (No. 96-202). Tom Huff's interest in the dignity clause was piqued by Deirdre Runnette's thoughtful work on the brief for the Women's Law Caucus.

5. Indeed, having concluded that the deviate sexual conduct statute, Mont. Code Ann. § 45-5-505, violated the Montana Constitution's right to privacy provision, the Montana Supreme Court explicitly declined to address the dignity clause. *Gryczan*, 283 Mont. at 438, 942 P.2d at 115.

6. Though the Montana Constitution's dignity clause is unusual, it is not unique. *See, e.g.* P.R. CONST. art. II, § 1.

7. 259 Mont. 147, 155, 855 P.2d 506, 511-12 (1993).

8. *Id.*

9. 291 Mont. 49, 75, 966 P.2d 1155, 1171 (1998).

10. *Id.*

clear its meaning. Indeed, unlike the constitutional right to privacy, the court has yet to develop the meaning of this clause in any of its opinions.[11]

It is our purpose in this article to clarify the meaning of the dignity clause by appealing to the structure and language of Montana's Constitution, the philosophical background of the Constitutional Convention's ideals, and the historical record of the Convention itself; and then to recommend a strategy for limiting the scope and, therefore, the legal application of this quite remarkable provision. We conclude that the dignity clause expresses a fundamental, if quite ordinary, ideal of post-Reformation, Western ethical and political thought. This ideal provides that human beings have dignity because they have intrinsic worth as individuals, and their dignity is found, in one form or another, in their capacity to live self-directed and responsible lives. To say, as the Montana Constitution does, that "[t]he dignity of the human being is inviolable"[12] is thus to assert that the intrinsic worth, the basic humanity, of persons may not be violated.

I. THE PLAIN MEANING OF THE DIGNITY PROVISION

A. The Structure of Article II, Section 4

The dignity clause of the Montana Constitution is found in Article II, Section 4. This provision reads, in full:

> Section 4. INDIVIDUAL DIGNITY. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

At first glance, the structure of this section might seem perplexing. As can be seen, the section consists of three distinct clauses[13] whose exact relationship to each other is not

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11. Two earlier, independent references to the dignity clause by Justice Shea similarly fail to develop the meaning of this clause: State v. Meadors, 177 Mont. 100, 111, 580 P.2d 903, 909 (1978)(dissenting opinion) and Oberg v. City of Billings, 207 Mont. 277, 285, 674 P.2d 494, 497-98 (1983). (For a less independent reading of the Dignity Clause see note 125, *infra*.)

12. MONT. CONST. art. II, § 4.

13. Throughout this article, we will refer to the whole of Article II, Section 4 as the "dignity provision," in light of its title. We will refer to the individual sentences contained within the dignity provision as the "dignity clause," the "equal protection

immediately obvious. The first clause is a simple and forceful declaration of the value of human dignity. This is hardly surprising, because, after all, individual dignity is the title of the section. It seems curious, however, that this rather broad reference is the only explicit mention of the word "dignity" in the entire section. The second clause, familiar enough to legally-trained readers, is an equal protection clause essentially identical to the one contained in the Fourteenth Amendment to the United States Constitution. The third clause, which we will call the "anti-discrimination clause," appears to be an extension of the theme of equal protection. It prohibits anyone from discriminating on the basis of certain defined categories. These include familiar categories such as race and sex, but also extend to less familiar ones such as social condition and political ideas.[14]

Any attempt to make some sense of the two references to "dignity" in Article II, Section 4, immediately faces several questions. First and foremost, what is the relationship between the concept of human *dignity* which is expressed in the title and first clause, and the concept of human *equality* which is expressed in the second two clauses? Second, why does the Section 4 provision have *both* an equal protection clause *and* an anti-discrimination clause? After all, the right to equal protection and the right to be free from arbitrary discrimination are normally considered to be the same thing. Third, do the broad references to dignity and equality in the first two clauses *add* anything to the specific prohibitions set forth in the third clause? Or should the third, anti-discrimination clause be considered the only part of the provision with any practical, effective meaning that can be applied in individual cases?

At first blush, it might appear tempting to ignore the first two clauses and concentrate on the third. After all, it will certainly be much easier, in practice, to determine whether persons have suffered discrimination based on the narrowly-drawn categories of race, sex, or political ideas than to determine whether their more nebulous right to "equal protection of the laws" has been violated. And of course, it will be harder still to determine whether "dignity" has been violated.

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clause," and the "anti-discrimination clause," respectively.

14. The anti-discrimination clause is also uncommonly broad in its reach–it prohibits discrimination both by the state and by private persons and entities (thereby avoiding the "state action limitation" of the Fourteenth Amendment). *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

After all, when assessing an equal protection claim, a court can at least look to the rather extensive body of case law interpreting the federal and state equal protection clauses for guidance. But in assessing a dignity claim, there would seem to be no obvious legal sources to which a court could turn, beyond the bare word "dignity" itself. Surely it would be much easier to treat the title and first two clauses of the dignity provision as mere precatory language–as constitutional "window dressing" so to speak–and treat the third clause as the only portion of the provision with substantive legal force.

Tempting though it might seem, this option is foreclosed to us. One of our oldest and most venerable canons of constitutional interpretation tells us that we must, if at all possible, treat each separate clause of a constitution as both substantively meaningful and not redundant.[15] This principle surely applies with particular force to words which, like "individual dignity," comprise the actual title of the section being interpreted. Daunting though the task may be, we believe Montana courts are compelled, when presented with the appropriate facts, to make some attempt to determine the substantive meaning of the dignity clause.

We would like to propose an alternative and, we think, more defensible reading of Article II, Section 4, a reading that gives meaning to all three clauses. As we see it, the language of the dignity provision moves in a logical progression from the general to the specific.[16] The title of the provision itself is "Individual Dignity;" thus, we must presume that all the language in the provision treats this topic in some respect. The first sentence, the dignity clause, obviously addresses dignity by declaring that human dignity is inviolable. The second sentence, we believe, goes on to declare *one way* in which human dignity can be violated–by denying someone the equal protection of the law

15. *See* Marbury v. Madison, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); State v. State Highway Comm'n, 89 Mont. 205, 211, 296 P. 1033, 1035 (1931) ("In expounding a constitutional provision it is our duty to give meaning to every word, phrase, clause and sentence therein, if it is possible so to do").

16. Unfortunately, the convention record does not provide a clear defense of this, or for that matter, any other reading of the structure of the dignity provision or of the meaning of the three clauses in relation to one another. Much of what record there is focuses on far more specific issues like the inclusion of women and private action in the anti-discrimination clause. Our reading of the structure of the provision rests on the language and structure of the text, the meaning of which must have seemed clear, if unanalyzed, by the convention delegates. Our discussion of the convention record can be found in Part II, *infra*.

based on some sort of arbitrary classification. Our legal tradition has long recognized such classifications as affronts to the dignity of persons. In *Brown v. Board of Education,*[17] for instance, what the United States Supreme Court clearly found wrong with segregated schools, even if they were materially equal, was that segregation itself failed to respect the dignity of African-American children. Indeed, racial segregation degraded them by failing to treat them *as equals.* The Court acknowledged this explicitly, citing social science studies showing that African-American children internalized that degradation.[18] They thought of themselves less worthwhile as human beings, as we might say, lacking the dignity of White children.

The third sentence of Article 4, the anti-discrimination clause, we believe, fleshes out the meaning of the equal protection right by enumerating certain types of classifications which the authors of the dignity provision believed to be arbitrary: race, color, sex, culture, social origin or condition, and political/religious ideas. But this cannot be read as an exhaustive list of all possible arbitrary, and therefore prohibited, classifications. If this list were exhaustive, the equal protection clause in the second sentence would be mere surplusage. By including this separate, more general equal protection clause in Section 4, the framers presumably intended to leave open the possibility that there are other prohibited classifications beyond those which were recognized at that point in history.[19]

By the same logic, and more central to the topic of this paper, the inclusion of a more general prohibition against the violation of human dignity in the first clause of Section 4, we believe, leaves open the possibility that human dignity can be violated in ways that do not involve some sort of arbitrary classification.[20] Indeed, it would seem that in order to give distinct and independent meaning to the dignity clause,

17. 347 U.S. 483 (1954).

18. *See Brown*, 347 U.S. at 494 n.11.

19. It is not difficult to think of examples of what such additional classifications might be. For example, in the twenty or so years following the adoption of the Montana Constitution, it gradually became an accepted norm of our society that persons ought not be discriminated against on the basis of disability. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336.

20. This would also be consistent with the structure of the provision. If the equal protection and anti-discrimination clauses were read to exhaust human dignity, then the dignity *clause* would be mere surplusage, because the title "Individual Dignity" would be sufficient to make that point.

avoiding redundancy, this clause should be applied separately when there is a violation of the dignity of persons that does not reflect the forms of unequal treatment or invidious discrimination prohibited by the two subsequent clauses. Presumably anyone could experience such a violation of dignity, not just persons who are members of protected classes.[21]

B. Plain Meaning

What, then, does it mean to violate the dignity of a human being? Thus far, we have simply argued that a reasonable construction of Section 4's structure and language suggests that the dignity clause must refer to treatment violative of individual, human dignity beyond that protected by the equal protection and non-discrimination clauses. So what does it mean to violate the dignity of a human being?

In our Western ethical tradition, especially after the Religious Reformation of the 16th and 17th centuries, dignity has typically been associated with the normative ideal of individual persons as intrinsically valuable, as having inherent worth as individuals, at least in part because of their capacity for independent, autonomous, rational, and responsible action.[22] Persons, understood as intrinsically valuable because of their capacity for sovereign control over their own lives,[23] claim our respect, and that respect is typically expressed in law through rights to both liberty and fair treatment. Everyone, for example, deserves due process of law. Even persons who have committed heinous crimes deserve due process, because we respect their worth, their dignity *as human beings*. Similarly, no persons deserve different treatment simply because of their race or gender. Such treatment fails to honor their intrinsic worth as human beings, degrading them by reducing them to contingent features of their humanity, such as their race or gender.

Treatment which degrades or demeans persons, that is, treatment which deliberately reduces the value of persons, and which fails to acknowledge their worth as persons, *directly* violates their dignity. But persons' dignity could also be more

21. As we will explain, the dignity clause might also be understood to supplement the application of equal protection as well as other rights in the Declaration of Rights. *See infra* text accompanying notes 114-118, 126-137.

22. *See, e.g.*, IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, 46-47, 53 (Lewis White Beck trans., Bobbs-Merrill 1959) (1785).

23. "Free and equal rational beings," Kant would say. *Id.*

indirectly violated whenever they are denied the opportunity to direct or control their own lives in such a way that their worth is questioned or dishonored.[24] This occurs, for example, any time an important liberty is denied.[25] But it could occur in other circumstances as well, as when the loss of autonomy undermines the fundamental conditions of a self-directed life.[26] Similarly, dignity may be *indirectly,* but more subtly, undermined by treatment which is paternalistic–treating adults like children incapable of making autonomous choices for themselves, or by trivializing what choices they do make about how to live their lives.[27]

In summary, the meaning of the concept of individual human dignity, in traditional Western ethics, imagines human beings as intrinsically worthy of respect, of having dignity, because of their capacity to live self-directed and responsible lives. Dignity may be directly assailed by treatment which degrades, demeans, debases, disgraces, or dishonors persons, or it may be more indirectly undermined by treatment which either interferes with self-directed and responsible lives or which trivializes the choices persons make for their own lives.

C. The Historical Origins of The Meaning of Dignity

1. Brief Cultural History

The historical origins of this, by now quite commonplace, conception of human dignity can be found in large part both in the Religious Reformation's conception of the capacity of individuals to achieve salvation through good works, without the mediation of the Roman Catholic Church, and in the 18th century Enlightenment's optimism about the capacity of individuals to carry on rational, self-directed lives and to act responsibly and reasonably in their relations with others in a

24. Our use of the term "indirectly" is not meant to suggest that these violations of dignity are less serious or important than "direct" violations.

25. See *infra* notes 114-118, 126-137 and accompanying text (discussing what we call the "complementary application" of the dignity right.)

26. For an illustration of this, see *infra* Part III.B.1 (discussing the right to physician-assisted suicide).

27. Analogously, we sometimes even say that persons can act in ways which fail to respect their own dignity, as in "it was beneath her dignity to lie" or "his submissive behavior failed to show a proper dignity," or we may compliment persons by saying they have "maintained their dignity despite grinding poverty."

shared civil life.[28]

Prior to the Religious Reformation of the 16th and 17th centuries in Europe, political organization (the state) was justified by an appeal to a widely shared, comprehensive religious morality–that of the Roman Catholic Church. When the Religious Reformation challenged the Church's authority over the truth of its particular version of Christian morality, the authority of the Church's religious morality *as the foundation for political organization* was also challenged.[29] Central to the Reformation's challenge to the Roman Church's authority over government was the often optimistic belief, widespread in the Reformed, Protestant churches, about the value and capacities of individual persons. The Church's justification for the use of state power to enforce religious belief rested on the somewhat less optimistic belief that individuals needed the structure, the institutions, and the practices of the church, as well as the coercive power of the state to reinforce those practices, in order to instill sufficient virtue in persons to make possible their salvation.[30] Indeed, it was, in part, the Church's reliance on state power to enforce Church doctrine, in the face of the changes proposed by the reformers, that led to such fundamental principles of the liberal state as individual liberty, including religious tolerance, and the doctrines of democratic government.[31]

As the great political philosophers of the 17th and 18th centuries, such as Hobbes, Locke, Bentham, and Kant, attempted to explain and justify the emerging secular state in Europe, they developed a number of ideas which shaped the modern, liberal ideal of justified government. From Hobbes came the idea of government as a contract amongst autonomous and self-interested persons seeking the order and security of government over the chaos and danger of the "state of nature."[32]

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28. *See* Hans Riess, *Introduction* to KANT'S POLITICAL WRITINGS 1, 6 (Hans Reiss ed., Cambridge Univ. Press 1971).

29. *See* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4-5 (1987).

30. *See* John Rawls, *Domain of the Political and the Idea of the Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 235 (1989). For a detailed example of the Roman Church's view, see THE POLITICAL WRITINGS OF ST. AUGUSTINE 184-240 (Henry Paolucci ed., Regnery Gateway 1962).

31. *See generally* JOHN LOCKE, A LETTER CONCERNING TOLERATION (James Tully ed., Hackett Pub. Co., Inc. 1983) (1689).

32. *See* THOMAS HOBBES, LEVIATHAN, PARTS I AND II 107 (Bobbs-Merrill 1958) (1651). For a discussion of Hobbes' view, see Rawls, *supra* note 30, at 2.

On Hobbes' view, government could be founded and justified even in the absence of any shared morality simply on the prudential, self-interest of individual persons.[33] Such a state should be understood as an artificial human creation established by an act of positive law-making, providing for order and security.[34]

By contrast, both Locke and Bentham attempted to offer a foundation for these emerging states in new, post-Reformation moralities. For Locke, in the 17th century, that new political morality could be found in the doctrines of God-given "natural rights" which justified the claims to the liberty, security, and property of individuals prior to the creation of a state, and which the state must protect in order to be morally justified and stable.[35] For Bentham, late in the 18th century, the secular comprehensive morality of utilitarianism (which requires that happiness, as specified by each individual person, be maximized) could justify government authority.[36] Government, according to Bentham, must accept the good of happiness, as decided by each individual, and pursue the utility-maximizing strategy of attempting to generate with public policy the greatest net sum of happiness.[37]

From Kant, in the 18th century, came a fuller and more secular articulation and justification for the ideal of individual rights than had been offered by Locke. For Kant, the concept of the individual as capable of rational, self-directed, and responsible action, logically required our respect, and that respect must be expressed politically, in rights guaranteeing the liberties necessary for the realization of this distinctively human capacity for autonomous, moral action.[38]

All of these 17th and 18th century political ideas ultimately played a role in the formation of our modern liberal state. From Hobbes, and from the experience of colonial charters, came the idea of constitution-making. From Locke, too, came the idea of

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33. *See* Hobbes, *supra* note 32, at 112.

34. *See id.* at 115.

35. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 5-6, 70-73 (Thomas Peardon ed., Bobbs-Merrill 1952) (1690).

36. *See* JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 3 (Hafner Press 1948) (1789). For a discussion of classical utilitarianism *see* JOHN RAWLS, A THEORY OF JUSTICE 19-24 (1999).

37. *See* BENTHAM, *supra* note 36, at 1-3.

38. *See* IMMANUEL KANT, POLITICAL WRITINGS, *On the Common Saying: 'This May Be True In Theory, But It Does Not Apply In Practice*, at 74-77 (Hans Reiss ed., Cambridge Univ. Press 1971).

constitution-making, but also came the right of revolution (best articulated in the Declaration of Independence); the principles of limited government; and the idea of a bill of rights, including the right to private property. From Bentham, especially in the 19th century, came the justification for the development of the role of democratic government, especially in the states, to exercise the police power in pursuit of the general welfare. Finally, from Kant, and certain liberal strands of the Protestant tradition, came the ideals of tolerance, justice, and fairness expressed in the abolitionist and women's suffrage movements and the Equal Protection Clause of the Fourteenth Amendment. Also from Kant, in particular, came the modern Supreme Court's analysis of the rights of conscience in our bill of rights as respecting the autonomy and dignity of persons. Without entering more deeply into these philosophical theories, we want to emphasize that, while these four principal political thinkers of the post-Reformation tradition disagreed regarding the details of the role dignity and autonomy should play in the analysis of political institutions, each, in his own way, justified the modern liberal state by appealing to the significance of individuals and the importance of respect for their choices or preferences.[39]

The widely shared political ideal of the inviolability of human dignity is, thus, implicit in much of the emerging liberal democratic tradition after the Reformation. It is this ideal, so essential to our notion of limited government, which we believe the framers of the 1972 Montana Constitution would most naturally have had in mind for the dignity clause.

Some evidence for just how commonplace this particular conception of human dignity was in the last half of the 20th century, and just what role it would most naturally have been

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39. These differences in the conceptions of individual autonomy and dignity often reflect the distinctive theoretical concerns of the particular post-Reformation philosopher. For example, Bentham, a utilitarian, would have viewed the dignity of persons as assured when the market-like preferences of specific individuals are counted and respected. On the other hand, Kant, a deontologist, identified dignity with more abstract characteristics, like the capacity for autonomy, not peculiar to specific individuals, but rather common to all individuals. Thus, respect for persons' dignity, for Kant, focuses on those traits they share as humans, while respect for the value of persons for Bentham focuses on counting as equally valuable the distinctive preferences which people express as specific individuals.

The post-Reformation philosophers did share, however, a conception of dignity that focused on the intrinsic dignity of persons rather than the dignity that persons achieve through their accomplishments or their virtues. This latter, more perfectionistic view characterized some pre-Reformation political ideas, especially those of the ancient Greek political philosophers Plato and Aristotle.

understood to play as an ideal of our political tradition when the Montana Constitution was written, can be easily seen not only in our everyday political rhetoric,[40] but also in United States Supreme Court opinions written during this period.

2. The Dignity Concept in Selected United States Supreme Court Opinions, 1965-1992

The concept of human dignity, as we have suggested, is a widely shared and seminal ideal of Western moral and political thought. Indeed, a principal purpose of liberal democratic states is to protect the dignity of their citizens, to assure citizens are honored by guaranteeing their autonomy and protecting them against degradation. This notion of "dignity" can be found in ordinary uses of this concept by the United States Supreme Court.

In 1965, in *Rosenblatt v. Baer*,[41] a case addressing the question whether a newspaper's impersonal attack on the fiscal management of a county recreation area could be used to establish defamation of those administering such an area, Justice Stewart wrote:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of *the essential dignity and worth of every human being–a concept at the root of any decent system of ordered liberty.* The protection of private personality, like the protection of life itself, is left to the individual states .... But this does not mean that this right is entitled to any less recognition by this Court as a basic of our constitutional system.[42]

In 1969, in *Goldberg v. Kelly*,[43] Justice Brennan spoke for the Court in recognizing the due process right of welfare recipients to pre-termination evidentiary hearings to help protect against arbitrary treatment by welfare bureaucrats. He noted: "*From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders.*"[44] Similarly, Justice Harlan, speaking for the Court in 1971 in *Cohen v. California*,[45] held that the First Amendment guarantee of free speech for a Vietnam war protestor whose

40. For example, dignity is often used in right-to-die and civil rights discussions.
41. 383 U.S. 75 (1965).
42. *Rosenblatt*, 383 U.S. at 92 (emphasis added).
43. 397 U.S. 254 (1970).
44. *Goldberg*, 397 U.S. at 264-65 (emphasis added).
45. 403 U.S. 15 (1971).

jacket read "Fuck the Draft" derived from "the belief that no other approach would comport with the premise of *individual dignity and choice upon which our political system rests.*"[46]

More recently, in the context of a state requirement of artificial nutrition and hydration to maintain life support for an individual in a permanent vegetative state, Justice O'Connor wrote in her concurrence:

> Requiring a competent adult to endure such procedures against her will burdens the *patient's liberty, dignity, and freedom* to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including artificial delivery of food and water.[47]

Finally, in the context of its most important recent abortion decision, Justices O'Connor, Kennedy, and Souter, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[48] said:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Services International*, 431 U.S. at 685. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird, supra*, at 453 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.* At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.[49]

In each of these uses of "dignity," the Court assumes that the dignity of persons is a central, foundational ideal of our political tradition closely allied to our ideals of liberty and autonomy. Respect for dignity affirms the worth of the individual as capable of making autonomous decisions regarding

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46. *Cohen*, 403 U.S. at 24 (emphasis added).

47. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring) (emphasis added).

48. 505 U.S. 833 (1992).

49. *Casey*, 505 U.S. at 851 (emphasis added).

what to say,[50] what medical care to accept or reject,[51] or whether to bear a child;[52] or it protects the individual from degradation by an attack on reputation[53] or by the arbitrary treatment of government agents.[54] In none of these cases is the Court's reference to "dignity" arcane or mysterious. Indeed, it is clear from the context of each use that the Court considers human dignity a core ideal of our political ethics, an ideal "on which our political system rests"[55] or an ideal "central to the liberty protected by the Fourteenth Amendment."[56]

Because this conception of dignity is such a pervasive feature of our shared ethical tradition, especially as we articulate it in the last half of the 20th century, and because it fits so well the structure and apparent purpose of Section 4, it is hard to imagine what else the framers of the 1972 Montana Constitution could have meant by it.[57] As it turns out, what little historical record we find in the Montana Constitutional Convention materials, of the concept of human dignity, suggests that the delegates' intent was indeed consistent with this ordinary and traditional meaning of dignity in our Western ethical tradition.[58]

II. THE ORIGINS OF MONTANA'S DIGNITY CLAUSE–THE CONVENTION RECORD.

A. The Convention Process

The constitutional convention, with the goal of rewriting or replacing Montana's 1889 constitution, was called by a vote of the people of the state in 1971. In preparation for the convention, the legislature, recognizing the need for "historical, legal, and comparative information about the Montana

50. *See Cohen*, 403 U.S. at 24.
51. *See Cruzan*, 497 U.S. at 289.
52. *See Casey*, 505 U.S. at 851.
53. *See* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966).
54. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970).
55. *Cohen*, 403 U.S. at 24.
56. *Casey*, 505 U.S. at 851.
57. *See infra* Part II.B, C.
58. We note that the convention delegates were remarkably prescient in their understanding of the reach of the traditional conception of dignity. They presumed that women and Native Americans fell within the protections of the dignity provision. Thus, while the delegates' intent draws on the ordinary meaning of dignity in our tradition, the delegates appeared to understand the scope of its application to be quite broad.

Constitution,"[59] "created the Constitutional Convention Commission."[60] The Commission, with the help of its staff, drafted a series of numbered "studies" which were submitted to the delegates to prepare for the convention itself. These studies often reveal both the sources and the ideals at play in the convention deliberations.

The convention delegates were elected in November 1971, and they began their deliberations on January 17, 1972, completing their work on March 24, 1972.[61] The delegates to the convention worked in drafting committees preparing the various articles of the constitution, and the committees submitted draft articles to the convention, meeting as a committee of the whole.[62] Any delegate could propose any provision for the new constitution, and delegate proposals were routinely referred to the appropriate drafting committee.[63] Each draft article, prepared by its drafting committee, could, of course, be modified by amendment after it was submitted to the convention, meeting as a committee of the whole.[64] After debate and amendment, the convention itself would adopt the article.[65] The article would then be transmitted to the Committee on Style, Drafting, Transition, and Submission which might rearrange or refine the language for purposes of coherence and style, and the revised article would be ultimately approved in its final form by the convention.[66]

The delegates submitted their final draft of the new constitution to a vote of Montana citizens on June 6, 1972, and this new constitution, as approved by the voters, went into effect on June 20, 1972.[67] After a brief, unsuccessful, legal challenge to the voting process, the provisions of the new constitution were implemented (over the next two years) according to the transition schedule provided in the constitution.[68]

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59. Montana Constitutional Convention 1971-1972, Study No. 10: Bill of Rights, at iii [hereinafter, RIGHTS STUDY].

60. *Id.*

61. *See* 1 MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS, at vi (1982). [hereinafter CONVENTION RECORD].

62. *See id.* at ii. Committee proposals are found in 1 CONVENTION RECORD, at 333-544, and 2 MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS, at 547-836 (1982).

63. *See* 1 CONVENTION RECORD, at 75-332.

64. *See* 1 CONVENTION RECORD, at ii.

65. *See id.*

66. *See id.*

67. *See id.* at vi.

68. *See id.*

B. The Convention Record of the Dignity Provision

The dignity clause, as it was ultimately approved by the voters of Montana, followed this drafting pattern. The clause first appeared in the *Bill of Rights Study* prepared by the Commission staff.[69] This study included a general historical and philosophical discussion of the idea of constitutional rights, a discussion and justification for a wide range of rights which might be included in the draft constitution, and, in its appendices, sample bills of rights and selected individual rights provisions.

How, then, did the dignity clause come to be included in the 1972 Montana Constitution? There were seven delegate proposals which included provisions addressing dignity, equal protection, or anti-discrimination.[70] Two of those proposals, 33 and 61, referred explicitly to dignity. Proposal 61, introduced by Richard Champoux, and co-signed by four other delegates, read as follows:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the law, nor be discriminated against in the exercise of his civil or political rights or in the choice of housing or conditions of employment on account of race, color, sex, birth, social origin or condition, or political or religious ideas, by any person, firm, corporation, or institution; or by the state or any agency or subdivision of the state.[71]

This proposal was adopted by the Bill of Rights Committee, without change[72] and submitted to the convention as Article II, Section 4, "INDIVIDUAL DIGNITY."[73] After a brief discussion of an amendment which would have eliminated the words: "by any person, firm, or corporation or institution" in the anti-discrimination clause (that failed), the convention delegates, acting as a committee of the whole, adopted this provision by a unanimous voice vote.[74]

Subsequently, the Committee on Style, Drafting, Transition, and Submission rearranged the language of Section 4,[75] and that

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69. The RIGHTS STUDY was prepared by Rick Applegate, research analyst on the Commission staff, and approved and published by the Commission's Research Subcommittee on the Bill of Rights.

70. *See* Delegate Proposal Numbers 10, 32, 33, 50, 51, 61, & 165, 1 CONVENTION RECORD, at 94, 126, 127, 148, 149, 161, 312.

71. Delegate Proposal Number 61, 1 CONVENTION RECORD, at 161.

72. *See* 2 CONVENTION RECORD, *supra* note 61, at 658.

73. *See* 5 CONVENTION RECORD, *supra* note 61, at 1642.

74. *Id.* at 1646.

75. *See* 2 CONVENTION RECORD, *supra* note 61, at 962.

revised language was adopted by the convention with almost no discussion.[76] The final version thus read:

> Section 4. INDIVIDUAL DIGNITY. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.[77]

We find nothing in the drafting or adoption record, including the very limited debate, which would indicate any sort of novel or radical meaning for the dignity clause. Apparently its ordinary meaning as a principal ideal of our ethical tradition naturally associated with equal protection and non-discrimination was obvious to the delegates. Indeed, in the only formal "Comment" by the Bill of Rights Committee on the entire dignity provision, the committee *never* mentions the dignity clause, focusing instead on its "intent of providing a Constitutional impetus for the eradication of public and private discriminations based on race, color, sex, culture, social origin or condition, or political or religious ideas."[78] In the course of the only debate over the adoption of Section 4 (a brief discussion which focused on the inclusion of "private action" in the prohibition on discrimination) Delegate Dahood, defending the scope of the proposed provision, did explicitly refer to dignity, stating: "[t]he intent of Section 4 is simply to provide that every individual in the State of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination."[79] Similarly, Delegate Proposal No. 33, the only other proposal that explicitly referred to dignity,[80] referred to dignity in a manner analogous to Delegate Dahood's remark. It read: "The rights of individual dignity, privacy, and free expression being essential to the well-being of a free society, the state shall not infringe upon these rights without a showing of a compelling state

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76. *See* 7 CONVENTION RECORD, *supra* note 61, at 2477. A brief discussion clarified that the deletion of reference to "agencies and subdivisions" of the state by the drafting committee simply reflected the judgment of the committee that these subdivisions of the state were, by definition, a part of the state.

77. MONT. CONST. art. II, § 4.

78. 2 CONVENTION RECORD, *supra* note 61, at 628. This "Comment" only incidentally mentions the equal protection clause, as well.

79. 5 CONVENTION RECORD, *supra* note 61, at 1643.

80. *See* 1 CONVENTION RECORD, *supra* note 61, at 127 (not adopted).

interest."[81] Both of these latter two references treat human dignity as an interest independent of, but connected to, the interests of persons in fundamental liberties and their interests in protection against degrading discrimination–precisely the ordinary use of the concept of dignity in our ethical tradition.[82]

C. The Convention Studies

The concept of human dignity also appears, explicitly, three times in the Bill of Rights Study. First, at the conclusion of an early section titled "Are States' Bills of Rights Necessary?" the Commission's study quoted a law review article from constitutional scholar, Professor Arval Morris of the University of Washington Law School, as part of the Commission's argument for the significance and importance of states' bills of rights. In this context, Professor Morris said:

> It is scarcely possible to exaggerate the importance of the role to be played by the state Bill of Rights during the next 100 years . . . . To be truly fundamental and meaningful any new Bill of Rights must aim for two goals: (1) preserving that enduring heritage of the past that has served us well, and (2) anticipate the fundamental trends of the future and safeguard human dignity and liberty for that era.[83]

Second, in a later section on the historical and philosophical foundations for a bill of rights, the Commission's study addressed the idea of inalienable rights. Seeking to distinguish between rights that flow from positive law (that are merely artificial, human creations) and inalienable rights (that inhere in individual persons as a matter of moral right prior to the formation of a state, and may not, therefore, be taken away by the state),[84] the study quoted Immanual Kant's *Groundwork of the Metaphysics of Morals*:

> [E]verything has either a value or worth. What has value has a substance which can replace it as its equivalent; but whatever is, on the other hand, exalted above all values, and thus lacks an equivalent, . . . has no merely relative value, that is, a price, but

81. *Id.*

82. The analysis presented here of these two references to the dignity concept, in the debate and in Proposal 33, benefitted from Scott Manning's term paper, *Death with Dignity in Montana*, submitted to meet the advanced writing requirement in the Elder Law Seminar at the University of Montana Law School (1999), which Manning generously shared with us.

83. RIGHTS STUDY, *supra* note 59, at 59 n.37 (*quoting* Arval Morris, *New Horizons for a State Bill of Rights*, 45 WASH. L. REV. 453, 485-86 (1970)).

84. *See* RIGHTS STUDY, *supra* note 59, at 82.

rather an inner worth, that is, dignity.[85]

The study, after describing this rather obscure passage as a "typically amazing insight,"[86] focused on the value/worth distinction to explain the distinction between rights that flow from positive law and rights that are inalienable.[87] The point the study made is that the inclusion of inalienable (moral) rights in a constitution would express this foundational insight from Western moral philosophy about the intrinsic (inner) worth, and, therefore, dignity of persons.

In the quoted passage, Kant is focusing on that seminal insight of post-Reformation political thought–that the value of human beings is not relative, but intrinsic, and may not, therefore, be traded for some other value. Human beings are, in other words, inviolable; and such beings, beings who have this intrinsic, inner worth, have dignity, not mere value. According to the study, inalienable rights, if included in the Montana Constitution, would not simply be created by the act of constitution-making; rather their presence in a new constitution would express, and reflect, this cardinal moral insight about the worth, and thus dignity, of persons from our ethical tradition.

As we have noted, the dignity clause actually appears in the constitution in Article II, Section 4, titled "INDIVIDUAL DIGNITY." The general discussion of the subject matter of this section in the *Bill of Rights Study* occurs in Chapter 10, "New Provisions." This part of the study never explicitly refers to human dignity. However, after discussing provisions in the 1889 Constitution regarding the rights of aliens to own mining property and the prohibition on slavery, the study offers two brief discussions under the subtitles of "Equal Protection of the

85. *Id.* (*quoting* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, *in* ROUSSEAU, KANT, AND GOETHE 11 (Ernest Cassirer, trans., Harper Torchbooks 1945) (1785)).

86. RIGHTS STUDY, *supra* note 59, at 82.

87. *See id.* at 82-83. Kant's purpose in this passage is to explain that only human beings, to the extent they are capable of acting as autonomous members of an ethical community, have inner worth or dignity. For Kant, the inner worth or dignity of each human being is found in the rational capacity to treat other human beings as ends and not as means (in other words to act "ethically" or "on principle"), and that every human being, having this rational capacity, has a right to claim of all other human beings exactly this same (ethical) treatment. To have dignity, in Kant's sometimes obscure manner of speaking, means to be an end to oneself, not an instrument of others, and to be thereby, duty-bound to respect others as ends in themselves. The capacity for ethical self-determination, in short, requires both that each person respect others and, reciprocally, that they be respected themselves.

Laws" and "Freedom from Discrimination."[88] Under the "Equal Protection" subtitle, the study points out little more than that "[i]f the state desired to go beyond the federal Fourteenth Amendment, constitutional wording could be included guaranteeing equal protection of the laws regardless of sex, income, or other specific attributes not covered by the Fourteenth Amendment."[89] Under the second, "Freedom from Discrimination," subtitle, the study points, in particular, to the lack of strong federal enforcement of civil rights and the need for protection against discrimination for women, handicapped persons, and Native Americans. The study also addressed the need to provide protection against private as well as state discrimination. The study noted, for example:

> It can be argued that Montana, with a significant and, culturally speaking, priceless minority population, is especially suited to the adoption of strong anti-discrimination provisions enforceable by those affected. This is even more the case given the increasing cultural awareness and pride of minorities in the state, as well as the legitimate concerns of emerging women's rights groups.[90]

Though this part of the Commission's study never explicitly refers to human dignity, its focus on women, handicapped persons, and Native Americans suggests to us a concern for harms to dignity associated with the distinctive forms of degrading, discriminatory treatment suffered by these three groups.

The study also provides, in its appendix, but without comment, nine examples of "Freedom from Discrimination" provisions from eight states and Puerto Rico.[91] Only the Puerto Rican Constitution's provision explicitly includes a dignity clause, and it is that clause which was included in Proposal 61 and ultimately adopted by the convention.

We did not find any other references to dignity in the convention's *Bill of Rights Study* or the convention debate on this provision. Thus, while the origins of the dignity clause of the Montana Constitution in the convention history and study materials do not provide us with any developed analysis of the clause's precise meaning or scope, they do suggest that there was nothing arcane or mysterious about the clause's meaning. Respect for the dignity of individual persons is a fundamental

88. RIGHTS STUDY, *supra* note 59, at 308-311.
89. *Id.* at 308-09.
90. *Id.* at 312.
91. *Id.* at 410-11.

principle of Western political ethics–indeed, among its highest ideals, and one of the fundamental purposes for which constitutional democracies are formed. The convention delegates apparently wanted to guarantee that the new Montana constitution protected the ideal of human dignity by explicitly asserting its inviolability.[92] As to determining the more specific legal implications of the dignity clause, the convention delegates appeared to leave that responsibility up to the Montana Supreme Court.

The convention materials do, however, suggest one additional source which might be explored to help determine the meaning of dignity in Article II, Section 4: the legal history of the Puerto Rican Constitution's dignity clause, which we know served as the model for our clause.

D. The Puerto Rico Dignity Provision

The dignity provision of the Puerto Rican Constitution served as the model for the Montana Constitution's dignity provision.[93] Therefore, as a simple matter of constitutional interpretation one can look to the body of case law interpreting Puerto Rico's dignity clause, as it existed at the time of the framing of the Montana Constitution in 1972, to shed light on what our constitution's framers intended Montana's dignity clause to mean. In our view, the pre-1972 Puerto Rican case law

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92. We contacted by phone Delegate Richard Champoux (the delegate who introduced Article II, Section 4). Though he served as the Chair of the Education and Public Lands Committee, and he is justly proud of that committee's work at the convention, Champoux described the Individual Dignity provision, Proposal 61, which he drafted and submitted, as the single provision of the 1972 Constitution of which he was most proud. Champoux confirmed that the dignity clause in his proposal was drawn from the same provision in the Puerto Rican Constitution, which had been included in the selected rights provisions of the Bill of Rights Study. When asked about his intentions for Proposal 61, he spoke eloquently about the influence of his mother, who strongly believed that men and women should be treated equally and with dignity. As Champoux explained it, his mother's beliefs reflected, in part, the indignities she had suffered in the employment markets when she was unable to get a job *because* she had a college degree.

He also spoke with deep concern about the degradation of native peoples in Montana due to discrimination, both by the government and by private persons. When we asked him specifically about his intentions for the dignity clause, itself, he made it clear that he thought of the clause as a protection against any treatment which degraded any persons, but especially that which degraded women and Native Americans. He simply wanted to assure the dignity of all persons. Telephone Interview with Delegate Richard Champoux, Drafter, Dignity Provision, Montana Constitutional Convention (May 2, 2000).

93. *See supra* text accompanying note 92.

is entirely consistent with the conception of Montana's Dignity Provision we have proposed above–that is, a provision designed to prohibit *all* infringements upon human dignity, including but not limited to infringements of equal protection.

Puerto Rico's dignity clause is contained in Article II, Section 1 of the Puerto Rican Constitution. It reads:

> § 1. [Human dignity and equality; discrimination prohibited]
>
> The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.[94]

The first thing worth noticing about this section is its location: It is the very first section of the Puerto Rican Bill of Rights. This suggests that the authors of the Puerto Rican Constitution considered dignity to be among the most fundamental rights which government must respect and protect. Moreover, like Montana's dignity provision, the Puerto Rican provision speaks of both human dignity and equality, although the exact relationship between the two is not immediately clear from the text. Finally, like the corresponding section in the Montana Constitution, Puerto Rico's dignity provision explicitly prohibits discrimination based on certain classifications, including one not mentioned in Montana's dignity provision: birth.

Most of the early cases interpreting Article II, Section 1 of the Puerto Rico Constitution address this prohibition on discrimination based on birth. The reason for this appears to be historical. Prior to the adoption of its constitution in 1952, Puerto Rico had been slowly doing away with a rule, codified in a 1911 statute, that illegitimate children were not entitled to bear their fathers' names or inherit their property.[95] In a series of cases, the Puerto Rican Supreme Court upheld a 1952 statute which provided that the Article II, Section 1 prohibition against discrimination based on birth would not be applied retroactively to persons born before the effective date of the constitution, and therefore illegitimate children born before that date had no right to inherit a portion of their parents' estate.[96] In 1963, however, the court abruptly reversed this holding, finding that the

94. P.R. CONST. art. II, § 1.

95. *See* Ocasio v. Diáz, 88 P.R.R. 658, 695-707 (1963).

96. *See* Correa v. Heirs of Piza, 64 P.R.R. 938 (1945); Marquez v. Aviles, 252 F.2d 715 (1958).

principle of human equality did not allow the legislature to discriminate between persons born before and after an arbitrary date.[97] Remarkably, the court made this ruling despite express language in the record of the constitutional convention stating that the framers did not intend for the prohibition on discrimination based on birth to take effect retroactively.[98]

In *González v. Superior Court*,[99] the Puerto Rican Supreme Court applied the anti-discrimination clause to sex-based discrimination. That case was brought by a woman whose family manufactured a highly regarded brand of Puerto Rican rum.[100] Following her father's death, her brothers refused to disclose to her the formula for making the rum, insisting that it was a family tradition that the formula only be passed from fathers to sons.[101] The court ordered her brothers to disclose the formula to her:

> Whatever the family tradition might be, the Constitution of the Commonwealth does not permit that there be discrimination between the petitioner and other members of the Estate (Succession) by reason of sex. The family tradition may be kept among the heirs and interested parties, but they cannot have the benefit of the court to make good, against the laws and the Constitution, a discrimination.[102]

Thus, although Puerto Rico's anti-discrimination clause, unlike Montana's, appears to apply only to state action, the court in effect extended the ban to private action by holding that the power of the state is invoked when parties seek to enforce private agreements in court.[103]

Finally, and most importantly, in *Puerto Rico Urban Renewal Housing Corporation v. Pena Ubiles*[104] the court made clear that the dignity right prohibits state actions which infringe upon human dignity in ways that do not directly involve discrimination or equal protection. In that case, the court struck down a lease which provided that the state could evict tenants from a public housing project on only 15 days' notice.[105]

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97. *See Diáz*, 88 P.R.R. at 708-10.
98. *See id.* at 708.
99. 97 P.R.R. 788 (1969).
100. *See González*, 97 P.R.R. at 789.
101. *See id.* at 790.
102. *Id.* at 791.
103. This approach has been used only infrequently by the United States Supreme Court. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 13 (1948).
104. 95 P.R.R. 301 (1967).
105. *See id.* at 305.

Following the "new property" analysis of Justice William Douglas in *Thorpe v. Housing Authority*,[106] the Puerto Rico Supreme Court found that enforcing the lease as written would effectively reduce the status of the tenants to that of medieval serfs, and therefore deny their basic human dignity:

> No person, and among those subject to the law of the state itself, may, by virtue of a contract, set aside or modify in such a fashion as to be equivalent to the annulment of its juridical rule, any law, custom, or the public purposes of the political order. The same could be said about legislation. Laws cannot turn a human being into a slave, or authorize a confiscatory contract, or alter the public trust which is the function of every State since it would run afoul of the *luminous sense of our constitutional law wholly designed for the protection of the dignity of the human being*.[107]

We believe the above cases, taken together, interpreting the Puerto Rican dignity provision confirm the basic reading which we propose for Montana's dignity clause: Both provisions, we think, are intended to guard against all infringements to the dignity of human beings. Such infringements will sometimes, but not always, come in the form of arbitrary discrimination.[108]

III. LEGAL APPLICATION

A. General Principles

The history of the Puerto Rican Constitution's dignity clause, the record of the Montana Constitutional Convention, and our shared Western ethical tradition suggest that there is nothing mysterious about the Montana Constitution's dignity clause. The dignity clause refers to the intrinsic worth of persons, and to the possibility that persons might be violated, that is, their worth might be degraded. The clause seems to say that the worth of persons, and the normative principle prohibiting the violation of persons, is antecedent to the writing of a constitution, and should be expressed in, and protected by that constitution. The difficult problem which remains is determining how this norm might be applied as a constitutional

106. 386 U.S. 670, 676-80 (1967).

107. *Urban Renewal Hous. Corp.*, 95 P.R.R. at 305 (emphasis added).

108. We recognize that, if one pushes the idea to its logical extreme, virtually any dignity claim can be cast in terms of equal protection. For instance, in *Thorpe*, we could say that the government "discriminated" against a class which consisted of the tenants of public housing. We believe, however, that such an analysis, while logically possible, fails to describe the true nature of the affront to dignity inherent in such action.

right.

The principal problem with the legal application of this norm, we believe, is how to define its substantive meaning specifically and narrowly enough to limit its scope to judicially manageable principles while remaining consistent with the ideals of the 1972 Convention as expressed in the other, complementary, norms included in the Montana Constitution. In other words, what, exactly, might a constitutional dignity right protect, and how might that right complement other protections provided by other rights such as the privacy right or the speech and religion rights? It is our view that breach of any of these rights offends human dignity to some extent. What, then, might the dignity clause itself, be understood to add to these other rights?

1. Forms of Application

Consistent with the analysis we have offered in Parts I and II, we believe that the dignity clause most plausibly and obviously adds a broad spectrum[109] protection against treatment which degrades the worth of individual persons, treatment that is not otherwise protected by the more specific provisions of the Declaration of Rights. The dignity right, when applied in this *independent* form, fills the gaps between the other norms which also protect our dignity. We know, for example, that our dignity, our core humanity, is threatened or compromised if the government discriminates against us based on some protected category (non-discrimination); or prevents us from speaking our minds (freedom of speech) or from practicing our religious beliefs (freedom of religion); or denies us the opportunity to know about (right to know) or participate in (right of participation) our government. If, however, some kind of degrading or demeaning treatment is not identified with, or encompassed by, any one of the traditional rights enumerated in the Montana Constitution's Declaration of Rights, then the requirement that human dignity not be violated should provide *independent* protection, assuring that the worth of each and every human being is always secure.

We also believe that the dignity right can inform, reciprocally, the meaning and force of some of the other, especially the more abstract, rights of the Declaration of Rights, like the equal protection or the privacy rights. Operating in this

109. By "broad spectrum" we mean something comparable in scope to the due process and equal protection rights.

way, the application of the dignity right can play a mutually *complementary* role, supporting or being supported by the other right.[110]

Finally, our tradition assumes that persons are capable of making autonomous and responsible decisions for themselves (and in the civic life they share with others), and because the dignity right seeks to honor this distinguishing capacity of their humanity, significant breaches of the dignity right may, as we have noted, *supra,* be either *direct* (treatment that overtly and directly degrades persons), or *indirect* (treatment that denies persons the opportunity to direct or control their own lives which then leads to serious degradation).[111]

2. *Limitations on Applications of the Dignity Right*

Whether applied in an *independent* or a *complementary* form, the scope of the protection provided by the dignity clause should, we believe, be limited in two ways. First, violations of dignity should be significant enough to assault the core humanity of persons by degrading, demeaning, debasing, or trivializing their worth as human beings. Inevitably the Montana Supreme Court will have to decide which violations of dignity are too trivial to rise to constitutional protection. Crucial to this determination will be a distinction between the sort of degradation which dishonors the worth of persons and the sort of minor indignities we typically associate with bad manners or personal slights.

Second, if the dignity clause is to maintain its force as a shared public ethical norm in a liberal, democratic, post-Reformation and therefore pluralist democracy, the substantive meaning of the clause must not be identified with, or justified by, any specific controversial religious or philosophical doctrines.

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110. Puerto Rico has applied its dignity clause in just this way. *See* People v. Rey Marrero, 109 P.R.Offic. Trans. 985 (1980) (finding that an illegal arrest would violate several different constitutional rights, including dignity, "the very first provision of our Bill of Rights . . . .").

The precise manner in which the dignity right will complement the other rights of the Montana Constitution will be very much a reflection of the constitutional tradition in which the dignity right is found. The German Constitution, for example, sensitive to the Holocaust experience, treats respect for dignity as limiting freedom of expression in ways that our more libertarian tradition, reflecting particularly our experience with "outsider" speech during the civil rights and Vietnam War movements, would not. This point we owe to law student, Bethany Graham and law professor, Fritz Snyder at the University of Montana.

111. *See supra* text accompanying notes 24-27.

The only reasonable political compromise we can reach in modern times (after the Reformation), when we must accept as fact that different segments of society will have deeply conflicting personal, religious, and philosophical views about how one ought to live one's life, is to agree to treat each other, and our respective values, with mutual respect and tolerance. This compromise makes possible the modern constitutional democracy, focused on securing the liberty and protecting the dignity of each person. Thus, the only conception of dignity that we can *all* share as citizens,[112] despite our other differences, in a post-Reformation state (the conception of dignity that, for example, the delegates to the Constitutional Convention could share), must focus on honoring the worth of autonomous individuals. To remain consistent with this shared, public ideal of dignity, the right to treatment with dignity must not be defined according to some parochial, sectarian religious or some controversial, philosophical notion of human dignity–those richer conceptions of dignity about which we have agreed to disagree.

Each of us may, of course, view our own particular lives as achieving dignity in a richer and more comprehensive sense, i.e., in accordance with our own full set of values (e.g., as Roman Catholics or as "born again" Christians), or our specific systems of belief (e.g., as feminists), or our rich and integrated culture (e.g., as Native Americans). We believe it important, indeed crucial, not to confuse the narrower, more limited, and yet more fundamental sense of dignity, which the state respects and which we can all share, from each individual's specific and more comprehensive conception of a dignified life. The post-Reformation state allows us all to share respect for the dignity of persons as capable of choosing comprehensive conceptions of the meaningful life. At the same time, the post-Reformation state cannot allow us to impose upon others, through the mechanism of the state, our own more specific conceptions of dignity which reflect our own controversial, comprehensive conceptions of how life should be lived. Only a shared *public* meaning for dignity could make the dignity clause consistent with our post-Reformation tradition, and of course with the other post-Reformation rights in the Declaration of Rights that focus on

112. We want to be clear that we are not referring to a majority view of dignity, but rather a consensus view, that is, one which reasonable persons can share, and which therefore can form a basis for constitutional principles. For a detailed discussion of the nature of this post-Reformation consensus, see Rawls, *supra* note 29.

tolerance and the autonomy and liberty of persons.[113]

In summary, we propose two limitations on the scope of the dignity right: The first of these limitations we call the *significance requirement.* The compromise of dignity must go to our worth as human beings, must, in other words, be important and serious. This requirement avoids what might be called "minor indignities." The second limitation on the scope of the dignity right we call *the secular or public meaning requirement.* When the dignity right is given substantive meaning in any constitutional context, that meaning must be based on an appeal to the shared public meaning of dignity, not a sectarian religious or controversial philosophical meaning.

Finally, we are also suggesting that the dignity right, duly limited, may be applied either as an *independent* right or as a mutual *complement* to another right. When the violation of dignity is independent, the protection provided by the right would come into play only when the affront to dignity is the sole focus of concern, rather than some other interest protected by one of the other rights in the Declaration of Rights. When the dignity right is applied as a complement to another right, the force of the dignity right will be limited to helping define the meaning and scope of the other right, or the other right will help define the meaning and scope of the dignity right. Some examples of these limitations and forms of application follow.

B. Examples

1. Physician-Assisted Suicide

Perhaps the most likely *complementary application* of the dignity clause to an issue that does involve another right in the Montana Constitution's Declaration of Rights, viz., privacy, would be to the current prohibition on physician-assisted suicide.[114] It is by now widely understood that modern medical practice makes it possible for us to maintain the life of an elderly or terminally ill patient far beyond what had previously

113. For a detailed discussion of this fundamental idea in liberal, democratic, post-Reformation theory, see John Rawls, *The Idea of Public Reason Revisited, in* THE LAW OF PEOPLES 131-180 (1999). We owe this important limitation on the meaning of the dignity clause to our friend and colleague, Visiting Professor Steven Kramer of the University of Montana Philosophy Department.

114. *See* MONT. CODE ANN. §§ 45-5-102, 45-5-105, 45-2-201 (1999); *see also* MONT. CODE ANN. § 50-9-205(7) (1999).

been possible. Very often, however, those who experience or observe such treatment describe its consequences as undignified, degrading, and dehumanizing. Consequently, elderly persons often speak, sometimes with hope, of dying quickly to avoid the indignities of extended end-of-life medical care, or they speak simply of dying with dignity. Their concern, readily understandable, is with the loss of control over their mental or physical functions. The indignities of having one's body out of one's control, or of having that body "serviced" by care givers, especially when enduring the pain of a terminal illness, can be quite dramatic and profound. To be forced to suffer those indignities, when unwanted and unnecessary, seems to us to violate the basic, core humanity of the sufferer. In short, these indignities are serious and, therefore, satisfy the *significance requirement*. As Ronald Dworkin has noted: "Death is, for each of us, among the most significant events of life."[115] To be forced, against one's wishes, to suffer that event with the loss of the core functions of our humanity, as can occur with some kinds of terminal illness, or some kinds of age-related infirmities, seems at odds with the assertion in the Montana Constitution that human dignity is inviolable.

Mastery of end-of-life events calls upon individuals to exercise great courage and great self control. Maintaining one's dignity in the context of the trauma of these events is no mean task. Being able to choose the time and circumstances of one's death, within reasonable constraints, would allow persons the opportunity to maintain their dignity. Physician assistance in suicide thus may be necessary to preserve dignity precisely because a physician can provide the correct, calculated, painless end to life–a quiet, pain-free passing away at the moment the patient chooses. The opportunity to make such a choice, thus, serves the end of human dignity.[116] Not surprisingly, when the application of the dignity right involves protection of intimate and personal choices regarding a person's private life, such as a choice to end one's life, there will frequently also be a right to privacy issue as well.[117] After all, protecting dignity will often

115. Brief of Amici Curiae of Ronald Dworkin, et al. at 7, Washington v. Glucksberg, 521 U.S. 702 (1997) (Nos. 95-1858, 96-110).

116. *But see* IRA BYOCK, DYING WELL (1997).

117. The application of Montana's privacy right to physician-assisted suicide is thoughtfully explained and analyzed in Scott Fisk, *The Last Best Place to Die: Physician-Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy,* 59 MONT. L. REV. 301 (1998).

require the exercise of autonomous control over our own lives, and interest which is protected by the privacy right.[118] Our point here, regarding the *complementary* application of the dignity right, is that the focus of concern with physician-assisted suicide is the preservation of dignity in the dying process. The exercise of the right to privacy (in the personal autonomy sense), can become a means to protecting dignity, and protecting dignity in this context can assure that one of our most important private choices is secure.[119] The two rights provide complementary protections.

Reasonable statutory limitations on when such a "private" choice should be permitted, to assure that the choice serves the end of dignity, would be thoroughly consistent with this complementary use of these two constitutional principles. Thus, reasonable limitations to assure that the choice is fully voluntary, uncoerced by outside influence or by pathologies such as depression, would be consistent with the ideal of dignity. However, an absolute prohibition on physician assistance to end one's own life may lead to an unnecessarily degrading and undignified death–a breach of the constitutional ideal of human dignity.

Finally, the absolute prohibition on physician assistance in hastening death asserted by various religious conceptions of the meaning of death, sometimes appeals, in religious terms, to the preservation of the dignity of human life. Such a view, which is currently expressed in law in many jurisdictions in the United States, fails the *secular, public meaning requirement* because it fails to respect the limitation that the meaning of individual dignity must be a public meaning which we can all share. To be forced into degrading or dehumanizing pain or suffering because of someone else's conception of a good or proper death exacerbates the loss of dignity, in the post-Reformation sense.

2. *Treatment of Persons under State Supervision*

Persons may come under state supervision for a variety of reasons, e.g., imprisonment for the commission of crimes or institutionalization for developmentally disabled or handicapped

118. *See id.* This is a typical *indirect* application of the dignity right. Government action does not directly dishonor the dignity of persons, rather it interferes with persons' autonomy in a manner which can lead to an undignified death.

119. The Montana Supreme Court might have analyzed *Gryczan*, 283 Mont. 433, 456, 942 P.2d 112, 126 (1997), in just this way using privacy and dignity as complementary rights.

persons unable to care for themselves or for persons who are mentally ill. In each of these instances, the humanity we presume to lie at the core of every person prohibits treatment which is demeaning, debasing, or degrading–treatment which would, in other words, meet the *significance requirement* of the dignity right.[120]

The vulnerability of the disabled and the mentally ill make them particularly susceptible to degrading treatment. Though neither of these groups is specifically protected by provisions in the Declaration of Rights, members of both groups might seek protection by invoking the dignity clause. This would be a good example of the *independent application* of the dignity right. In the case of the developmentally disabled, for example, we provide dignified care when basic human needs for food, shelter, cleanliness, medical care, and physical and psychological security are assured, and when the capacities of the developmentally disabled, physical or mental and however limited, are provided the opportunity to develop in a manner which acknowledges the core humanity of this vulnerable group of persons.[121] Programs like the Special Olympics seem to us particularly forceful expressions of our community's respect for the dignity of such persons. Similarly, in the case of the mentally ill, basic human needs must be met, along with adequate opportunity to develop capacities, and adequate mental health care must also be provided to treat the illness. It is natural to speak of the inherent dignity of such developmentally disabled or mentally ill persons, and to speak of the requirement that such vulnerable persons be treated with dignity.[122]

For those imprisoned for crimes, *complementary application* of the dignity clause would be more appropriate. The reformation and prevention functions of punishment both express the community's disrespect for the *actions* of the criminal, but the processes of punishment must never disrespect the core humanity of the prisoner. Section 22 of Article II

120. It would meet the *secular meaning requirement* as well.

121. Failure to provide this care would *directly* implicate the dignity right, because such treatment would directly degrade persons.

122. A similar protection might be provided to recipients of welfare or other government benefits. While procedural protections are provided under the "new property" principles of *Goldberg v. Kelly*, 397 U.S. 254 (1969), the dignity clause could assure that recipients are treated with dignity in the application for, and administration of, such benefits.

prohibits the infliction of cruel and unusual punishment on persons.[123] Section 28 mandates "reformation" as one of the foundations of punishment for crimes.[124] Part of what these rights proscribe and mandate should be informed by the *complementary application* of the dignity clause. However we punish, whatever means we use to reform, we must not punish or reform in a way that degrades the humanity, the dignity, of the prisoner. Protecting dignity should include, for example, security from physical harm, including security from sexual violation, by other prisoners or guards. It should also include attention to such basic human needs as adequate medical care, humane rules for visitation, adequate exercise, and adequate opportunity for education or other capacity-developing activity. Prisoners may not claim that their punishment, itself, violates the dignity clause, unless the conditions of that punishment violate the cruel and unusual punishment prohibition, and that violation might most easily be elaborated by asking whether the core humanity of the prisoner is being treated with dignity.[125]

3. Two Examples of Discrimination: (1) Against Disabled Persons and (2) Against Gay Men and Lesbians

The *complementary application* of the dignity right, discussed in Subsections 1 and 2 above, demonstrates how the right might supplement and elaborate a traditional "liberty" right, like the right to be free from cruel and unusual punishment. When the dignity right is applied with the equal protection right, however, its role could be different. In this sort of *complementary application*, the dignity right could help us identify the suspect class, and the degrading, undignified treatment implicit in the treatment the class receives–the treatment which deserves the protection of the equal protection right. The dignity right might be particularly constructive when classifications reflect animus or prejudice toward traditionally unprotected groups. Examples can be found in two recent

123. MONT. CONST. art. II, § 22 ("Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishment inflicted.").

124. MONT. CONST. art. II, § 28 ("Laws for the punishment of crime shall be founded on the principles of prevention and reformation . . . .").

125. The Montana Supreme Court has given the dignity clause a complementary reading in *Matter of C.H.*, 210 Mont. 184, 201, 683 P.2d 931, 938 (1984). The court held "that under the Montana Constitution physical liberty is a fundamental right without which other fundamental rights would have little meaning," referring to dignity, due process and other rights in the Declaration of Rights. *Id.*

United States Supreme Court cases.

In *Cleburne v. Cleburne Living Center,*[126] the Court faced the question of whether a city's refusal to grant a zoning permit, which would have allowed the siting of a home for the mentally retarded in a residential neighborhood, was a breach of the principle of equal protection of the laws. Justice White, writing for the Court, concluded that denial of the permit reflected the city's irrational prejudice against the mentally retarded,[127] and thus failed to meet the rational basis test, the lowest level of equal protection analysis. The other Court members, all of whom concurred in the outcome, devoted most of their opinions either to the wisdom of the three tier analysis of equal protection cases (Justice Stephens, joined by Chief Justice Burger) or to whether mental retardation should identify a class which deserves heightened, mid-tier scrutiny because this class has been subject, in the past, to "segregation and discrimination that can only be called grotesque"[128] (Justice Marshall, joined by Justices Brennan and Blackmun). All members of the Court appeared to recognize both that "[e]xcluding group homes [from ordinary neighborhoods] deprives the retarded of much of what makes for human freedom and fulfillment–the ability to form bonds and take part in the life of the community"[129] and that the city's decision reflected "prejudice" against the retarded, without exception. However, the attention of each justice focused on the complexities of equal protection doctrine.

Under the Montana Constitution's dignity clause, a case like *Cleburne* might be better analyzed under the dignity right by our court, focusing on the attack on the core humanity of retarded citizens implicit in the decision to deny them the right to participate fully in the community. Isolation, like segregation, is degrading, because it says the rest of the community does not want to share its life with retarded citizens. The degradation takes the doctrinal form of a failure to provide equal protection in the application of the zoning permit process. Focusing on the failure to treat retarded persons with dignity, together with the "as applied" use of the equal protection right, helps identify both the class and the degrading treatment which equal protection prohibits.

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126. 473 U.S. 432 (1985).
127. *See Cleburne*, 473 U.S. at 450.
128. *Id.* at 461.
129. *Id.*

In an analogous case, *Romer v. Evans*,[130] the Court faced an amendment to the Colorado Constitution, "Amendment 2," that precluded any level of state action directed to protecting persons of "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships."[131] The Court, in striking down Amendment 2, found that it defied conventional equal protection analysis because it was "at once too narrow and too broad."[132] As the Court said: "It identifies persons by a single trait and then denies them protection across the board."[133] Because of the breadth of the disability visited on this class of persons, the Court described the amendment as "unprecedented in our jurisprudence" and "as inexplicable by anything but animus toward the class it affects."[134] The Court then concluded, after reviewing the justification the state offered for the Amendment 2, that the amendment lacked a "rational relationship to a legitimate government purpose."[135] Thus, while the Court conceded that it was the state's animus toward the class which explained the disability imposed by Amendment 2, the Court is, nonetheless, forced by its own, traditional, tiered analysis to reject the classification, *not as degrading*, but as irrational.

Again, under the *complementary application* of the dignity clause to the equal protection clause, the analysis of a case like this would focus on the degradation implicit in the animus (identified by the Court), an animus so profound as to lead to the exclusion of a particular group of persons from the democratic political processes. Respecting persons' dignity includes counting them as capable of self-government. This idea is essential to democratic government in the post-Reformation tradition.[136] Denying some class of persons the right to participate fully in the political process, denying them full citizenship in their democracy, is an extreme indignity, a failure to count the members of the class as full citizens. The constitutional issue would be better captured by the equal protection right when complemented by the dignity right than it would be by focusing on the irrationality of the state's asserted purpose. The irrationality of the state's asserted purpose in

130. 517 U.S. 620 (1996).
131. *Romer*, 517 U.S. at 624.
132. *Id.* at 633.
133. *Id.*
134. *Id.* at 632, 633.
135. *See id.* at 635.
136. JOHN RAWLS, A THEORY OF JUSTICE, 205-06 (Rev. ed. 1999).

cases like this often reveals the actual purpose–animus–because the purpose "cooked up" by the state to rationalize its classification makes little sense. In this respect the *complementary application* of the dignity clause, with the equal protection right, might more accurately and sensitively reach the heart of the issue–the animus or the irrational prejudice.[137]

Finally, those who proposed Amendment 2, including the religiously based Family Life Council in Colorado, might well attempt to argue that dignity is protected if we prevent gay men and lesbians from participating in the political processes, because the state would not then honor, in its laws, their "undignified life style." The conception of dignity, on which such arguments rest, appeals to sectarian interpretations of religious texts like the Bible. Such interpretations of dignity must fail as interpretations of Montana's constitutional dignity right, because they fail the *secular, public meaning requirement* discussed above.

IV. CONCLUSION

The dignity clause of the Montana Constitution proclaims one of the fundamental and indispensable political ideals of the Western democratic political tradition–that the dignity of the human being is inviolable. The daunting responsibility for defining the meaning and scope of this grand ideal, for purposes of its legal application as a constitutional principle, falls to the Montana Supreme Court. Though invited to address this task in the briefs in *Gryczan*, the court, exercising understandable caution, applied another principle–privacy, with a better developed meaning and scope. Soon, however, we believe the court will face an issue, like physician-assisted suicide, in which the central issue, indeed even the conventional rhetoric of the issue, demands consideration of the meaning and scope of the

137. A similar analysis could be used, we believe, for the state's denial to same sex couples the benefits and protections which are granted to opposite-sex married couples. In a recent decision, the Vermont Supreme Court held that under the Common Benefits Clause of the Vermont Constitution which guarantees that the government is "instituted for the common benefit, protection, and security of the people. . ." same-sex couples may not be denied the benefits and protections which the state's laws provide opposite-sex married couples. *See* Baker v. Vermont, 744 A.2d 864, 874, 888-89 (1999). Again, the complementary application of the dignity clause with the equal protection clause could identify the failure to provide equal benefits and protections in Montana law to same-sex couples as a failure to respect the core humanity of gay and lesbian couples by denying that they can create, for themselves, the same sort of committed, loving relationships which heterosexual couples can create.

dignity clause.

We have tried in this essay to clarify the meaning and role of the dignity norm in our Western political tradition, viz., that the dignity of persons commands respect and must not, therefore, be violated. We have also tried to suggest how the dignity right might supplement the other rights of the Declaration of Rights, first, by assuring, in contexts not identified with the other rights, that the core humanity of persons is protected, and, second, by complementing and elaborating the meaning of those other enumerated rights.

Montanans are extraordinarily lucky to have a constitution with a Declaration of Rights which so clearly and forcefully articulates the grand ideals of constitutional democracy, such as dignity, privacy, and the right to know. The burden of "making good" on the promise of this constitution now falls to attorneys in the state to raise the appropriate issues, and ultimately to the Montana Supreme Court to elaborate and institutionalize these quite glorious rights.